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No. 85-1513

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

EDWIN W. EDWARDS, *et al.*, *Appellants*,

v.

DON AGUILLARD, *et al.*, *Appellees*.

On Appeal From The United States Court Of Appeals
For The Fifth Circuit

BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, THE AMERICAN JEWISH COMMITTEE, THE NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE U.S.A., AND THE GENERAL CONVENTION OF SWEDENBORGIAN CHURCHES AS AMICI CURIAE IN SUPPORT OF APPELLEES

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STATEMENT OF INTEREST

Americans United for Separation of Church and State is a nonprofit corporation formed to maintain and advance civil and religious liberties through enforcement of the rights and privileges granted by the First and Fourteenth Amendments to the United States Constitution.

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*Counsel for both appellants and appellees have filed blanket letters of consent with the Clerk of this Court.

Americans United has a membership of some 40 thousand members of various religious beliefs and some of no religious belief in all states of the United States including the State of Louisiana. Creationists represent a significant percentage of the membership and staff of Americans United and are represented on the board of trustees. Americans United is involved in extensive litigation of First Amendment free exercise and establishment issues throughout the United States.

Americans United has been involved in most major Free Exercise and Establishment Clause cases coming before the United States Supreme Court, including such cases as: *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971); *Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. 756 (1973); *Meek* v. *Pittenger*, 421 U.S. 349 (1975); *Estate of Thornton* v. *Caldor, Inc.*, 105 S.Ct. 2914 (1985); *Grand Rapids School District* v. *Ball*, 105 S.Ct. 3216 (1985); and *Aguilar* v. *Felton*, 105 S.Ct. 3232 (1985).

Americans United is particularly interested in the issues raised in this case because, although it has firmly stood for the separation of church and state, it likewise recognizes that the Religion Clauses of the First Amendment together are intended to preserve religious liberty for all.

The American Jewish Committee, a national organization of approximately 50,000 members, founded in 1906, is dedicated to the defense of the civil rights and civil liberties of all Americans. AJC is committed to the belief that separation of religion and government is the surest guarantee of religious liberty and has proved of inestimable value to the free exercise of religion in our pluralistic society.

Nowhere is the need to maintain that separation greater than in the context of the public schools, where the dangers from undue utilization of state institutions to advance religious doctrine are the greatest. In order to guard against such inappropriate use of the schools, AJC was a plaintiff in *McLean* v. *Arkansas Board of Education*, 529 F.Supp. 1255 (E.D. Ark. 1982), and joins in this brief as *amicus curiae*.

The National Council of the Churches of Christ in the U.S.A. is a cooperative agency of thirty-one national religious bodies in the United States having an aggregate membership of over 40,000,000. The Council does not presume to speak for all of those adherents but for its Governing Board, the body of some 280 members appointed by the several member denominations in proportion to their size and their support of the Council, which determines its policies.

The policies of the National Council of Churches have been consistently supportive of the public schools but have opposed use of public schools by any religious group to advance its sectarian teachings or practices. The prevalent view among most of the constituents of the National Council of Churches is that evolution is not contrary to belief in God as Creator of the universe and of all life within it. Scientific discoveries and hypotheses about these matters simply contribute to our understanding of *how* God carried out the (continuing) act(s) of creation. Thus, the dispute over "evolution science" vs. "creation science" is in large part a theological dispute into which public schools and civil courts should not be drawn. Objective study in public schools of the mechanisms of creation does not impugn belief in God as Creator nor impose an obligation to teach such theological beliefs as part of secular science instruction, though notice may be taken of

them, by attribution—"some people believe that God created all life in a single past act of creation . . . etc."—but in social studies rather than in science classes.

The General Convention of Swedenborgian Churches, founded in 1817, is a denomination consisting of approximately 3,000 members. From its inception, the Swedenborgian Church has stressed a complementary relationship between science and religion and strongly supports the principle of separation of church and state to ensure the values of religious freedom and pluralism. It therefore joins in this brief in the belief that the Balanced Treatment Act misconstrues the relationship between science and religion, misinterprets the religious nature of Scripture, and violates the principle of separation of church and state.

SUMMARY OF ARGUMENT

In affirming the district court's grant of summary judgment to appellees, the court of appeals correctly focused on the central and dispositive issue—the purpose of the Louisiana legislature in enacting the Balanced Treatment Act. Even if it were conceded that the law requires the teaching only of scientific theory and not religious doctrine, the statute clearly serves an impermissible legislative purpose, both on its face and as a matter of historical record. The ostensible purpose of preserving academic freedom is unconvincing. It is intended to obscure the statute's true purpose: to direct that whenever instruction is given on a topic considered to be inconsistent with the teaching of a particular religious view—the theory of evolution—students shall also be instructed in another theory, that of creation science, which is considered not to be in such contradiction.

Consequently, the Balanced Treatment Act impermissibly advances religion. Despite appellants' self-serv-

ing assertions to the contrary, "creationism" does not fall within any cognizable definition of scientific theory. It is neither the product of, nor susceptible of change pursuant to, the scientific method. Instead, creationism represents a religious approach to a natural phenomenon presented in the language, but not the methodology, of science. There is nothing wrong with a religious world view—but the Constitution clearly bars its advancement in the public schools.

Not only does the Balanced Treatment Act generally advance religion, but it favors one particular religious belief—fundamentalist Christian doctrine—over all others. By no means do all religious denominations subscribe to a literalistic interpretation of the Genesis account of creation. Yet, only one sectarian belief has the benefit of a statutory direction that a "scientific" theory, constructed so as to parallel its religious tenets, must be taught in the schools under certain circumstances. This is an unconstitutional imposition on the consciences of those of other faiths and on the consciences of those who subscribe to no religion at all.

Finally, in advancing a particular religion for unconstitutional purposes, the Balanced Treatment Act works to the detriment of all religious groups—including fundamentalist Christians—it seeks to serve. Religious doctrine is debased and trivialized when it is presented for laboratory testing on the same level as other classroom presentations.

ARGUMENT

I. THE LOUISIANA BALANCED TREATMENT ACT LACKS A SECULAR PURPOSE REGARDLESS OF THE DEFINITION GIVEN TO CREATION SCIENCE.

Many issues have been raised and argued in this case. They have ranged from the current state of scientific

theory regarding the origins of man to the power of the state to prescribe curriculum in the public schools. But the court of appeals correctly focused on the central and dispositive issue--the purpose of the Louisiana legislature in enacting the Balanced Treatment Act, La. Rev. Stat. §§ 17:286.1-286.7. For even if it were conceded that the law requires the teaching only of scientific theory and not religious doctrine, the Act is still unconstitutional because of its impermissible legislative purpose.

In *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), this Court set out a tripartite test which a statute must pass in order for it to be compatible with the Establishment Clause. If a statute fails any part of the test, it is unconstitutional. The first prong of the test requires that statutes have a secular legislative purpose. Just last term, this Court reaffirmed in *Wallace* v. *Jaffree*, 105 S.Ct. 2479 (1985), that a court's analysis need go no further if it is determined that a statute had an impermissible religious purpose.

Both lower courts in this case correctly determined that the Louisiana Balanced Treatment Act had an unconstitutional religious purpose. Analysis of this case need focus only on this narrow issue since this religious purpose renders the statute unconstitutional regardless of the determinations made with respect to any of the other issues in this case. At the same time it should be understood that although the purpose of the legislation was unconstitutionally to advance a religious viewpoint, its impact may well be exactly the opposite. *See* Point IV *infra*.

Both the district court and the court of appeals found that there was no secular legislative purpose for the Act. Both courts found that the legislature had a religious purpose in enacting this legislation. "When both courts

below are unable to discern an arguably valid secular purpose, [the Supreme Court] normally should hesitate to find one." *Wallace*, 105 S.Ct. at 2495 (Powell, J., concurring).

The Louisiana Balanced Treatment Act states that it was enacted for the purpose of protecting academic freedom. Such a purpose is a valid secular purpose. But this Court has stated that "No legislative recitation of a supposed secular purpose can blind [this Court to the existence of a plainly religious purpose.]" *Stone* v. *Graham*, 449 U.S. 39, 41 (1980). Justice O'Connor noted in her concurring opinion in *Wallace* that she had little doubt that courts would be able to distinguish between sham secular purposes enunciated by legislatures and sincere ones. 105 S.Ct. at 2500. The recitation of a purpose to protect academic freedom in this Act was clearly a smokescreen intended to obscure the true religious purpose of the Act. The lower courts refused to be blinded by this smokescreen. This Court should affirm their decisions.

In *Abington School District* v. *Schempp*, 374 U.S. 203, 223-224 (1963), this Court rejected an avowed secular purpose that was inconsistent with other factors in the statute. The court of appeals here correctly noted that a statute mandating the teaching of a particular theory in certain circumstances was by its very nature contrary to the basic concept of academic freedom. *Aguillard* v. *Edwards*, 765 F.2d 1251, 1257 (5th Cir. 1985).

Moreover, the Balanced Treatment Act on its face raises religious implications due to the inherently religious nature of the concept of creation. Where, as here, the valid secular objectives put forth by the state can be readily accomplished by other means that would have less or no religious implications, the Court should

not follow its normal policy of being reluctant to attribute improper religious motives to a legislature. *Larkin* v. *Grendel's Den*, 459 U.S. 116, 123-24 (1982); *Lynch* v. *Donnelly*, 465 U.S. 668, 699 (1984) (Brennan, J., dissenting).

The hollowness of the purpose recited by the legislature is revealed when one looks for the threat to academic freedom against which this law is intended to protect. None can be found. In *Wallace*, this Court rejected the argument that the legislative purpose was to protect every student's right to engage in voluntary silent prayer because the Court found that this right was adequately protected without benefit of the statute in question. *Wallace*, 105 S.Ct. at 2491. Justice O'Connor, concurring in *Wallace*, recognized that if one considers facilitating free exercise rights to be a religious purpose, it is a valid purpose, but only if there exists a burden on free exercise that needs to be lifted. *Id.*, at 2504-05.

As the court of appeals noted, there is nothing in the case law that would cast any doubt on the right or ability of any teacher to teach any scientific theory about the origin of man, whether or not it was consistent with any particular religious belief. *Aguillard*, 765 F.2d at 1257. Nor is there anything restricting such academic freedom in the statutes of Louisiana. There is no threat to be protected against, no burden to be lifted. Teachers were as free to teach evolution, as well as any other scientific theory of origins, prior to the enactment of the Balanced Treatment Act as they were after its enactment. What they are not free to do now that they were free to do before is to discontinue teaching one of these theories as science progresses and new theories are postulated and old theories are discredited.

The uniqueness of the Balanced Treatment Act, coupled with its narrow specificity, in the context of the entire legislative scheme of Louisiana with respect to education also demonstrates the true religious purpose behind the enactment. In striking down Arkansas' anti-evolution statute in *Epperson* v. *Arkansas*, 393 U.S. 97 (1968), this Court pointed out, "The overriding fact is that Arkansas' law selects from the body of knowledge a particular segment which it proscribes for the sole reason that it is deemed to conflict with a particular religious doctrine. . . ." *Id.*, at 103. Similarly, out of the entire body of knowledge that might be covered in a public school curriculum, and out of all the subjects that might be addressed in a science class, the Louisiana legislature has focused on one narrow subject area, and, more specifically, two particular theories. This law does not require science teachers to make students aware of competing scientific theories as a general policy. It does not even require that all theories regarding origins be given balanced treatment.[1] It only focuses on evolution and creation. The religious dispute concerning these two theories cannot be ignored. Nowhere else does the Louisiana legislature prescribe in such detail what shall be taught in public schools. The religious purpose for requiring that creation always be taught if evolution is taught cannot be denied.

The right of a state to regulate what is taught in its public schools is beyond doubt. However,

> [t]here is and can be no doubt that the First Amendment does not permit the State to require that teach-

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[1] The court in *McLean* v. *Arkansas Board of Education*, 529 F. Supp. 1255, 1269 (E.D. Ark. 1982), specifically found that there are more than two current theories of origins. This fact need not be relitigated in this case.

> ing and learning must be tailored to the principles or prohibitions of any sect or dogma. . . .
>
> * * *
>
> . . . The State's undoubted right to prescribe the curriculum for its public schools does not carry with it the right to prohibit . . . the teaching of a scientific theory or doctrine where that prohibition is based upon reasons that violate the First Amendment.

Epperson, 393 U.S. at 106-07. Louisiana cannot enact a law requiring that creation be taught whenever evolution is taught when the law is enacted for religious reasons.

II. THE LOUISIANA BALANCED TREATMENT ACT HAS THE PRIMARY EFFECT OF ADVANCING RELIGION BOTH BY CONVEYING A MESSAGE OF ENDORSEMENT OF FUNDAMENTALIST CHRISTIAN BELIEFS AND BY COMPELLING THE TEACHING OF RELIGIOUS DOCTRINES IN PUBLIC SCHOOLS.

The Balanced Treatment Act also runs afoul of the second prong of the *Lemon* v. *Kurtzman* test for identifying governmental acts which impermissibly establish religion. As a matter of law and of historical record, the Act's incorporation of creation science into the curriculum whenever the theory of evolution is taught has a principal or primary effect of advancing religion.

This Court has repeatedly held that "the undivided freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all." *E.g.*, *Wallace* v. *Jaffree*, 105 S.Ct. 2479, 2488 (1985). Accordingly, as the Court stated in *Everson* v. *Board of Education*, 330 U.S. 1, 15 (1947), "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion,

aid all religions or which prefer one religion over another." In so holding, the Court has specifically rejected any argument that the freedoms protected by the religion clauses merely proscribe "the preference of one Christian sect over another," or that the Constitution does not accord equal standing to the conscience of an atheist or the practitioner of a non-Christian faith. *Wallace*, 105 S.Ct. at 2488-89. As Justice O'Connor stated in her concurring opinion in *Lynch* with respect to the effect test, it is crucial that a legislative action not have the effect of conveying a message of governmental endorsement of religion or of any particular religious belief. 465 U.S. at 691-92. Regardless of the legislature's intent, in light of the history of the religious dispute over creation and evolution and the undisguised religious motives of creation science's most vocal advocates, it is unavoidable that the Balanced Treatment Act will convey to an objective observer a strong message of endorsement of fundamentalist Christian belief. *See Wallace* at 2501 (O'Connor, J., concurring).

As we will show, based on appellants' own submission, "creation science" or "creationism" is not science at all, but is instead religious doctrine with its essential nature obscured. The premise of creationism is, in essence, that the development of life, and thereafter of specific life forms, took place suddenly and "ex nihilo." In supporting this premise, creationism generally relies on a negativistic approach. The primary concern of this school of thought is not to provide an explanatory mechanism by which life and species developed, but rather to counter the propositions advanced under the various formulations of the theory of evolution. As such, creationsim is an *ex post facto* rationalization for certain religious beliefs, rather than a genuine product of inductive reasoning applied to unexplained phenomena.

In his decision in *McLean* v. *Arkansas Board of Education*, 529 F.Supp. 1255 (E.D. Ark. 1982) (striking down Arkansas' "balanced treatment" act), Judge Overton set forth several generally accepted characteristics of science: "(1) it is guided by natural law; (2) it has to be explanatory by reference to natural law; (3) it is testable against the empirical world; (4) its conclusions are tentative, i.e., are not necessarily the final word; and (5) it is falsifiable." *Id.* at 1267 (citation to record omitted).

As Judge Overton correctly found, creation science simply fails to meet these essential criteria. The premise of creationism, however framed, is sudden creation "from nothing." Such a concept is not science because it depends upon a supernatural intervention which is not guided by natural law. It is "not explanatory by reference to natural law, is not testable and is not falsifiable." Creationism is not the product of collected data which is weighed and evaluated and integrated into a unified structure. Creationists, instead, have taken ". . . the literal wording of the Book of Genesis and attempt[ed] to find scientific support for it." *Id.*, at 1269. Once the unifying idea of a supernatural creator is removed from creationism, the "theory" explains nothing. It is premised on general negations of evolution which refer to no coherent theory.

That creationism is a restatement of religious doctrine is evident as much from what is not said in the Balanced Treatment Act and in appellants' defense thereof as in what is said. The Act defines "creation science" as "the scientific evidences for creation and inferences from those scientific evidences." Tellingly, however, the Act fails to define "creation."

The definition of "creation" can be found, however, in the "Balanced Treatment" bill originally proposed by Senator Keith:

> "Theory of creation ex nihilo" means the belief that the origin of the elements, the galaxy, the solar system, of life, of all the species of plants and animals, the origin of man, and the origin of all things and their processes and relationships were created ex nihilo and fixed by God.

Senate Bill No. 956, Reg. Sess., 1980, La. State Senate (Don Pfeffer Affidavit, sworn to September 11, 1984 ("Pfeffer Aff."), Exhibit A(1)). The model Balanced Treatment Act, presented to the Joint Subcommittee on Elementary, Secondary and Vo-Tech Education on November 25, 1980, bears a fuller definition of creation science, which, similarly, more clearly defines what it is the concept of creation entails:

> "Creation-science" means the scientific evidences for creation and inferences from those scientific evidences. Creation science includes the scientific evidences and related inferences that indicate: (1) sudden creation of the universe, energy, and life from nothing; (2) the insufficiency of mutation and natural selection in bringing about development of all living kinds from a single organism; (3) changes only within fixed limits of originally created kinds of plants and animals; (4) separate ancestry for man and apes; (5) explanation of the earth's geology by catastrophism, including the occurrence of a worldwide flood, and (6) a relatively recent inception of the earth and living kinds.

(Pfeffer Aff., Exhibit A(5)).

Given the lack of any substituted definition for creation in the Act as enacted, the definitions in the model Act and in the bill as originally proposed must be given great weight as to what the legislators had in mind—as opposed to the conclusory and vague descriptions of creation science provided in the affidavits specifically prepared by appellants for litigation. The definitions given to creation

science in these earlier versions may not provide a basis for determining the exact parameters of creation science, but they do reveal the inescapably religious nature of the subject, as well as the religious purpose for the legislation. Creation science, particularly as defined in these earlier versions, falls squarely within the analysis set forth in *McLean*. Senator Keith's original bill refers explicitly to creation as "ex nihilo and fixed by God." In any event, "'creation out of nothing' is a concept unique to Western religious thought. . . . Indeed, creation of the world 'out of nothing' is the ultimate religous statement because God is the only actor." *McLean*, 529 F. Supp. at 1265.

The affidavit of Dr. Dean H. Kenyon, placed in the record by appellants, is as evasive in its definition of creation as the Balanced Treatment Act. Dr. Kenyon tells us that "Creation-science means origin through abrupt appearance in complex form, and includes biological creation, biochemical creation (or chemical creation) and cosmic creation," while disclaiming that "creation-science" necessitates such "Genesis-derived concepts" as "catastrophism, a world-wide flood, a recent inception of the earth or life, from nothingness (*ex nihilo*), the concept of kinds." Finally, he opines that creation science and evolution are "the sole scientific alternative approaches." (Appendix A to Appellants' Brief at A-9, 10). However, nowhere in this discussion or elsewhere in the affidavit does Dr. Kenyon define "creation," nor does he explain what we are to understand "abrupt appearance" to mean if not creation "ex nihilo." Moreover, while the affidavit purports to present evidences of "creation," it actually provides no more than statements of problems with various aspects of the theory of evolution. Certainly, no discussion is to be found of a theoretical mechanism by which

creation supposedly took place. The same gap is to be found in the other "uncontroverted" affidavits presented by appellants.

However, the affidavit of the Rev. Dr. William G. Most does present a clue to what appellants mean by "creation" as expressed in the following self-contradictory formulation: "The concept of a creator is also not inherently religious, although it can be stated in religious terms; and it is not religious in its relation to creation-science." (Appendix A to Appellants' Brief at A-38). Thus, appellants implicitly acknowledge that the "creation" of creation-science embodies the concept of a "creator"—but then seek to assert that the concept of a "creator" is not inherently religious.[2] Such an oxymoronic thesis need not be "controverted" for this Court to find that, as a matter of law, reference to a "creator" as an explanation of cosmological and primordial phenomena is unavoidably religious in nature. There is no concept of such a creator outside religious discourse.

Scientific theory simply cannot be premised on the intercession of a supernatural creator, thus it does not include or contradict it. To posit such an element as *part* of

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[2] In his accompanying affidavit, Dr. Terry L. Miethe, while also asserting that the concept of a creator "is not inherently religious," suggests that the "concept of a creator is not central to creation science." (App. A to Appellants' Brief, at A-33). In light of the discussion of creationist thought in appellants' other submissions, this suggestion need be given no weight. *See, e.g.*, Affidavit of Dr. Kenyon, App. A to Appellants' Brief, at A-22 ("preexisting, intelligently designed type [on a printed page] was intelligently arranged to form a text. . . . The DNA texts of the first living cell must have originated in an analogous way."), and A-23 (. . . "[T]he origin of life must have required an intelligence of some kind which was the source of the original biologic information.").

a *scientific* theory would end the process of scientific inquiry and analysis. At that point the realm of religious thought would be entered. This is a fundamental methodological premise upon which atheistic and religious philosophers of science are agreed. Thus, one commentator has noted, writing from a non-religious viewpoint, scientific theory must necessarily rely for explanation of present events on those that have gone before. "Explanation in terms of causes means pointing out a previous event that is connected with the later event in terms of general laws. If there were a first event, it could not have a cause, and it would not be meaningful to ask for an explanation." H. Reichenbach, *The Rise of Scientific Philosophy* 207 (1951).

Similarly, an Orthodox Jewish commentator has stated, contrasting the theory of evolution with creation:

> Evolution tries to reveal "design without a designer," and *indeed any scientific theory must do this.* It is only in this way that it can fulfill one of the prime functions of a scientific theory—to indicate further promising lines of research. . . . One reason why "creation" cannot be a substitute for a scientific theory is because it is too final an answer. It fails to suggest any further lines of research for people who want to know *how* the world is put together.

H. Marcell, "Evolution—Theory or Faith?", in Carmell & Domb, *Challenge: Torah Views on Science and Its Problems ("Challenge")* 195 (rev. ed. 1978) (emphasis supplied). That same commentator concludes, "[The theory of evolution] does not bring God into the equation, because He does not belong there. Unfortunately, this harmless and inevitable fact has misled some . . . into thinking that evolution is somehow 'against God.'" *Id.* at 196-97. In other words, in that commentator's view, it is the role of

science to explain the *how* of the world, leaving to religion an explanation of the *why*.

While appellants point to a number of current criticisms of the theory of evolution, the Court need not be drawn into a debate on the validity of any particular scientific theory. For it is clear on the record before the Court that the proponents of creation science are only able to combine their critiques of the theory of evolution into a unified whole in a context which makes creationism's religious nature obvious. The appellants are unsuccessful in setting out a coherent theory of creation science because, in an attempt to evade the prohibition of the Establishment Clause, they have stripped away from creation science all explicit religious references. But it is only in the context of religious doctrine that creation science obtains any semblance of a comprehensive theory. Thus, appellants tell us which "Genesis-derived concepts" their version of creation science purportedly does *not* require, and further tell us why particular proofs of evolution are *not* valid. They do not tell us, however, by what mechanism creation is purported to have taken place. What is left, then, is not a "scientific alternative approach," but a theological assertion, a statement of faith.

This lack of a coherent, truly secular theory of creation science has serious practical implications. The Act requires public school teachers to teach a theory of creation science that, based upon the structure of the Act, is clearly contemplated as a competing theory of origins. It is simply impossible for any teacher to teach creation science as a coherent theory without reference to such religious concepts as the Creator and creation *ex nihilo*.

In sum, appellants' self-serving description of creationism as "science" cannot obscure the fact that this

doctrine does not fall within any cognizable definition of a scientific theory. It is neither the product of, nor susceptible of change pursuant to, the scientific method. Instead, creationism represents a religious approach to a natural phenomenon disguised in the language, but not the methodology, of science. "Creation science" or "creationism" is not science at all, but is instead religious doctrine with its essential nature obscured. There is nothing wrong with a religious world view—but the Constitution clearly bars the advancement of theological doctrines in the public schools.

III. THE LOUISIANA BALANCED TREATMENT ACT PREFERS ONE RELIGIOUS POINT OF VIEW OVER OTHERS.

Creationism's approach to the material world is not only religious, rather than scientific. It also constitutes the imposition of a religious world-view which is in fundamental contradiction to the views of those of other faiths which view scientific and religious thought as distinct though complementary. This is not to say that practitioners of these other faiths "believe" in evolution in the sense that they may believe in a Deity. Were genuine scientific evidence to develop that discredits evolution, such evidence or the conclusions to be drawn from it would in no sense threaten the religious faith of these other groups in the fashion that evolution apparently is thought to threaten advocates of creation science. It is to say, however, that mandating the teaching of a particular theory in science curriculum to advance a specific religious belief violates the right of these other practitioner groups not to have their children exposed in public schools to religious doctrines they do not share taught as scientific truths.

A review of the doctrines of various Christian and Jewish denominational groups demonstrates that the par-

ticular religious view of creation which creationism incorporates is a "narrowly sectarian one at that." J. Wood, "'Scientific Creationism' and the Public Schools," 24 *Journal of Church and State* 240 (1982). Accordingly, to require the teaching of "creation science" in public schools would constitute not only the establishment of religion in a general sense, but also the preference and promulgation by the state of one particular religious point of view at the expense of others. As such, a statute mandating the teaching of "creation science" constitutes a violation of the Establishment Clause even under the most narrow interpretation of that provision which has been suggested by a member of the Court. *See Wallace*, 105 S.Ct. at 2520 (Rehnquist, J., dissenting) (the Establishment Clause was intended "to prohibit the designation of any church as a 'national' one and to stop the Federal Government from asserting a preference for one religious denomination or sect over others")[3]; *see also Larson* v. *Valente*, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.").

Thus, the Catholic Church preaches that the belief that God creates each and every human does not exclude (nor, for that matter, mandate) the possibility of evolution of the human form:

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[3] Thus, even assuming, *arguendo*, the Establishment Clause did not require the government to be strictly neutral between religion and irreligion (which the Court's precedents clearly do require), it certainly would prevent the State of Louisiana (to which the Court unanimously acknowledges the Establishment Clause is applicable) (*see Wallace*, 105 S.Ct. at 2520 (Rehnquist, J., dissenting)) from favoring a sectarian fundamentalist Christian belief over all other religions.

> The teaching authority of the Church does not forbid that, in conformity with the present state of human sciences and sacred theology, there should be research and discussion, on the part of men experienced in both fields, with regard to the doctrine of evolution, insofar as it inquires into the origin of the human body as coming from pre-existent and living matter—for the Catholic faith obliges us to hold that souls are immediately created by God.

Pope Pius XII, *Humani Generis* (1950).

Among Protestant denominations one also finds many exponents of the view that evolution is not incompatible with the Bible. Of the twenty-three plaintiffs in *McLean*, twelve were clerics, among them Methodist, Roman Catholic, Episcopalian, and African Methodist Episcopal bishops, as well as representatives of Presbyterian and Southern Baptist congregations.[4] *McLean*, 529 F.Supp. at 1257.

Lutheran theologian Richard Hanson has stated that the Biblical narratives "are liturgical paeans that exalt God as Lord of Creation. . . . [T]o treat them as scientific accounts is to misunderstand both science and the Bible." Similar views have been expressed by Arkansas United Methodist Bishop Kenneth Hicks. The South Carolina Baptist Christian Life and Public Affairs Commission and the Georgia's stated clerk of the Presbyterian Church in the United States have each opposed creationism bills in their respective states as a violation of the principle of separation of church and state. *See* "Creationism, Evolution and the Schools," 34 *Church & State* 12(108) (1981).

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[4] The Union of American Hebrew Congregations, the Reform Jewish congregational organization, and non-denominational Jewish organizations, including *amicus* The American Jewish Committee, were also represented in or parties to the action.

The sectarian divisions which characterize Christian responses to this issue are also found among members of the Jewish faith. Hence, Rabbi Menachem Mendel Schneerson, the Lubavitcher Rebbe, has taken a position quite similar to that of the creationists. He (as well as many other Orthodox Jews) asserts that the Biblical account of creation should be accepted literally, and that the scientific theory of evolution is without validity. M. Schneerson, "A Letter on Science and Judaism," in *Challenge* 142 (1978).

In contrast, Rabbi Seymour Siegel of the Conservative denomination's Jewish Theological Seminary, accepting as authoritative the conclusion of the vast majority of respected scientists as to the validity of the theory of evolution, has asserted that evolution and the Biblical account of creation are *both* true: "God used evolution as a means for his creation." C. Blinderman, "Unnatural Selection: Creation and Evolutionism," 24 *Journal of Church and State* 73 (1982). Reform Rabbi Jack Luxemberg has simolarly asserted that "Judaism can affirm God's presence in creation regardless of varying opinions on the mechanics of the creative process." Reform Judaism, he argues, views creationism as an unacceptable attempt to "subordinate every scientific or technological advance to the dictates of absolute convictions based on religious beliefs and teachings." J. Luxemberg, "Science, Creationism, and Reform Judaism," *Journal of Reform Judaism*, Summer, 1982 at 46-47.

Noted Orthodox authorities differing with the Lubavitcher Rebbe's approach also find no necessary conflict between evolutionist theory and their religious beliefs. To the contrary, many would object to the notion that the truth of their sacred Torah is in any sense threatened by objective study of the universe and by the reason-

able conclusions drawn therefrom. Thus, Rabbi Abraham Isaac Kook, the late Chief Rabbi of the Ashkenazic Community of Isreal, stated with respect to the Biblical account of creation that, "[H]ere, if anywhere is the realm of parable, allegory and allusion." A. Kook, *Orot Ha-Kodesh* 559 (1938) in *Challenge* 135-36.[5] It is in this tradition that many Orthodox Jewish scientists have recognized that a dispassionate view of the origins of life is not inconsistent, in any fundamental sense, with their religious beliefs:

> Those who think they must disprove evolution to maintain *emuna* [faith] must realize that our consciousness of the reality of the spiritual world is based on stronger foundations than gaps in the fossil record. And those scientists who proclaim that by explaining certain aspects of the mechanism of life they have banished purpose from the universe must be made to realize that they have done nothing of the sort. We must learn to lose our fear of evolution. We must realize that its vaunted attack on *emuna* is a sham. Not because evolution is unsound (though it may well be so), but because even if it were sound, even if it were proven fact, it could have no bearing on true *emuna*, which in the final instance is based on our individual awareness of ourselves as spiritual beings and on our historical consciousness as Jews.

AOJS [Association of Orthodox Jewish Scientists] Students' Questions Panel, "Actual and Possible Attitudes to Evolution Within Orthodox Judaism" in *Challenge* 254, 268.

Appellants seek to deny the explicitly sectarian nature of creation science by asserting that it, like evolution, is a

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[5] *Cf.* Maimonides, *The Guide for the Perplexed* (translated by Friedlander) 4 (1956) (The story of creation "has been treated in metaphors. . . .").

scientific explanation which is merely "consistent with . . . various religions that span the full theological spectrum," and that the two doctrines are "comparably non-religious." (Appellants' Brief, at 22-24). This assertion, however, distorts the nature of both evolution and creation science in an effort to bring the latter under the constitutional axiom that "the 'establishment clause' does not ban federal or state regulations whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions." *McGowan* v. *Maryland*, 336 U.S. 420, 442 (1961).

In pursuit of the untenable proposition that evolution and creationism are "comparably non-religious," appellants propose a false dualism in which the universe of religions is misleadingly divided between those which avowedly are protrayed as "creationist" while others are "evolutionist." To be sure, there are fundamentalist sectarian groups whose beliefs are "creationist"—that is, it is a fundamental tenet of their creeds that life arose suddenly and *ex nihilo* through the intervention of the Creator. However, the description of various other religions and schools of philosophical thought as "evolutionist" is, at best, a misnomer. Thus, appellants describe Reform Judaism as "evolutionist" on the strength of a citation to W. Plaut, *The Torah: A Modern Commentary* 6, 16 (1974) (Appellants' Brief, at 23). Yet a review of the text in question reveals not that evolution is a tenet of Reform Judaism but, rather, that Reform Judaism rejects a literalist reading of the Bible which would require a devout believer to deny the objective results of scientific study.

Similarly as to Buddhism and Hinduism, while these faiths are assuredly not "creationist" (the concept of creation being unique to Judeo-Christian belief), they also do

not subscribe to the scientific theory of evolution as a tenet. Quite the contrary, Hindu cosmology (which is extremely varied among its adherents) bears no resemblance to either the Judeo-Christian concept of creation or to the theory of evolution. *See, e.g.*, A.C. Bhaktivedanta Swami Prabhupada, *Srimad Bhagavatam, First Canto—Part One* "Creation" (1978). As to Buddhism, the very question of whether the world arose by "creation" or by "evolution" may be a meaningless one: "The time-scale of Buddhist . . . thought is vast by Western historical standards, and reaches back infinitely into the past and infinitely forward into the future." Parrinder, *World Religions: From Ancient History to the Present* 263 (1971).

Evolution as a scientific theory developed, as any product of the scientific method, out of observation, theorization, and the search for verification or falsification. Those religious practitioners who accept evolution do so not out of religious faith, but because they are persuaded on the evidence that the theory is "true." In this sense, as was noted above, they do not "believe" in evolution in a fashion that one may be said to "believe" in the tenets of a faith. Moreover, even were it shown that the reality of evolution was a tenet of a particular faith, there is certainly no basis in the historical record to suggest that the theory was developed out of a desire to support such a religious belief.[6] Creation science, on the other hand, is a construct

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[6] Thus, as *McGowan* makes clear, there can be no argument that the state favors those of "non-literalist" faiths—or of no faith—by allowing evolution to be taught in the public schools. As the district court stated in *Wright* v. *Houston Independent School District*, 366 F. Supp. 1208 (S.D. Tex. 1972), *aff'd*, 486 F.2d 137 (5th Cir. 1973), *cert. denied*, 417 U.S. 169 (1974), the teaching of the theory of evolution insofar as it is the product of objective scientific analysis, ". . . is

intended to find scientific support for the narrative set forth in the literal wording of the Book of Genesis. It is disingenuous, and palpably untrue as a matter of historical record, to suggest that creation science "'*merely* happens to coincide or harmonize with the tenets of some or all religions.'" (Appellants' Brief, at 24 (emphasis supplied)).

IV. THE LOUISIANA BALANCED TREATMENT ACT HAS A DETRIMENTAL EFFECT ON RELIGION BY TRIVIALIZING AND SECULARIZING IMPORTANT RELIGIOUS BELIEFS.

The test enunciated in *Lemon* v. *Kurtzman* prohibits governmental action whose principal or primary effect is detrimental to religion as much as it prohibits action which advances religion. The sponsors of the Louisiana Balanced Treatment Act, however unwittingly, compromise religion by demanding that "creation science" be treated and taught the same as every secular theory as to the origin of human life.

In *United States* v. *Ballard*, 322 U.S. 78 (1944), this Court recognized that "[m]an's relation to his God was made no concern of the state," *id.* at 87, and that "[m]en may believe what they cannot prove." *Id.*, at 86. To those who believe in a Divine Creator, the proof of His existence and His handiwork is primarily the result of faith rather than scientific proof. To require that the belief in creation

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peripheral to the matter of religion. Science and religion necessarily deal with many of the same questions, and they may frequently provide conflicting answers. But . . . it is not the business of government to suppress real or imagined attacks on a particular religious doctrine. . . . Teachers of science in the public schools should not be expected to avoid the discussion of every scientific issue on which some religion claims expertise." *Id.* at 1211 (citation omitted).

be subject to the same type of evaluation and testing as secular theories of the origin of man and the universe can only demean religion. This would be particularly true where teachers might not have the basis in faith and understanding to do justice to creationists' views. There is no guarantee that some teachers would not exhibit hostile attitudes toward such religious concepts.

Worse yet, to those who look to the Biblical account of the origin of man as a profound affirmation of God's omnipotence, it only debases, trivializes, and secularizes those beliefs when the story of creation is abstracted from its religious setting and significance to be presented for analysis and laboratory testing on the same pragmatic level as any other classroom presentation. *See Lynch* v. *Donnelly*, 465 U.S. at 712 (Brennan, J., dissenting) and 726 (Blackmun, J., dissenting).

CONCLUSION

For each of the foregoing reasons, the decision of the Fifth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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